Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-29

COMPLETE AUTO TRANSIT, INC.,
Appellant,

vs.

CHARLES R. BRADY, JR., CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this case be dismissed on the following grounds:

1. The appeal does not present a substantial federal question; and the judgment of the Supreme Court of the State of Mississippi rests on an adequate non-federal basis.

I.

STATEMENT OF THE CASE

This case involves an assessment for sales taxes made by the Mississippi State Tax Commission upon the appellant, Complete Auto Transit, Inc. The appellant, a Michigan corporation, had contracted with General Motors Corporation to haul certain motor vehicles from Jackson, Mississippi, to various General Motors dealers within the State of Mississippi.

The State Tax Commission pursuant to its authority under Sections 10105 and 10109(2), Mississippi Code of 1942 (Supp. 1972), made an assessment upon the gross receipts earned by the appellant corporation for transporting various vehicles from Jackson, Mississippi, to other points within the State of Mississippi.

The vehicles were initially shipped by rail from a General Motors manufacturing plant located outside of the State of Mississippi to a railhead ramp and storage area located in Jackson, Mississippi. At the time the vehicles were placed on railroad cars at the assembly plant, a straight bill of lading was prepared by General Motors as consignor naming itself as consignee in care of Complete Auto Transit, Inc., in Jackson, Mississippi. Upon arrival in Jackson, the shipping documents were stamped Received General Motors Corp., by Complete Auto Transit. Subsequent to the receipt of the vehicles in Jackson, the appellant would prepare a waybill from General Motors, Jackson, Mississippi, consignor, to designated dealers in Mississippi as consignee, load the vehicles on trucks, and transport the designated units to various dealers throughout the state.

The State Tax Commission made no assessment upon the appellant for the transportation of motor vehicles from Jackson, Mississippi, to points outside of the state. Also, there was no tax levied upon the railroads for transporting the vehicles into Jackson from outside of the State of Mississippi. The taxes that are the question of this case were restricted to the transportation of the motor vehicles from Jackson, Mississippi, to points within the State of Mississippi itself. For the period August 1, 1968, through July 31, 1972, the Mississippi State Tax Commission assessed Complete Auto Transit, Inc., taxes in the amount of $167,375.30.

The assessment of the State Tax Commission was appealed to the Chancery Court of Hinds County, Mississippi. After a complete hearing on the matter, Chancery Court entered its decree on August 6, 1974, affirming the assessment. Upon appeal, the order of the lower court was affirmed by the Supreme Court of the State of Mississippi on April 13, 1976. The case is reported at 330 So.2d 268.

II.

ARGUMENT

POINT 1

The Transportation Activity Involved in This Cause Was Intrastate in Nature and Thus Subject to the Assessment Levied Upon It by the Mississippi State Tax Commission.

This case involves the taxation by the Mississippi State Tax Commission of a transportation activity that was purely of an intrastate nature. The activity being assessed

transpired entirely within the boundaries of the State of Mississippi.

The Mississippi State Tax Commission relied upon Sections 10105 and 10109(2) of the Mississippi Code of 1942 (Supp. 1972) in assessing a tax upon the transportation activity that is the subject of this case. Section 10109 (2) provides in part as follows: "Upon every person operating a railroad, airplane, bus, or any other transportation business for the transportation of persons or property for compensation or hire between points within this state, there is hereby levied, assessed and shall be collected, a tax equal to five percent (5%) of the gross income of such business, . . ."

The Mississippi Supreme Court in affirming the assessment of the State Tax Commission relied upon a case previously decided by the Supreme Court of the State of Washington, *Convoy Company* v. *Taylor,* 334 P.2d 772 (Wash. 1959). The factual situation found in *Convoy* was identical to that found in the case presently before this Court. In *Convoy,* Ford Motor Company shipped its cars from assembly plants in California to its local dealers in Washington in the same manner employed by General Motors in our case (R. 110 and 111). The automobiles were shipped by rail on a straight bill of lading with Ford Motor Company as consignor and "Ford Motor Company, c/o Convoy Co., Seattle, Wash." as consignee. The Supreme Court of Washington, as did the Mississippi Supreme Court in the present case, relied upon the cases of *Interstate Oil Pipe Line Co.* v. *Stone, infra,* and *Dunn Brothers, Inc.* v. *Stone, infra,* in holding that the assessment of the tax did not contravene the Interstate Commerce Clause of the United States Constitution because the transportation of the automobiles from the railroad depot in Seattle,

Washington, to other cities in the State of Washington constituted intrastate commerce.

The Supreme Court of the State of Mississippi in affirming the assessment of the tax in question relied heavily upon two cases which were previously dealt with by this Court, *Interstate Oil Pipe Line Co.* v. *Stone,* 203 Miss. 715, 35 So.2d 73 (Miss. 1948), aff'd 337 U.S. 662, 93 L.Ed. 1613, 69 S.Ct. 1264 (1949) and *McKeigney* v. *Dunn Brothers, Inc.,* 224 Miss. 762, 80 So.2d 802 (1955), suggestion of error overruled, 81 So.2d 712 (1955), appeal dismissed for want of a substantial federal question, *Dunn Brothers, Inc.* v. *Stone,* 350 U.S. 878, 76 S.Ct. 139, 100 L.Ed. 775 (1955). In *Interstate* the Court upheld a tax upon the gross receipts of the operation of a pipeline wholly within the State of Mississippi. The pipeline was used to transport oil from various oil fields in the state to loading racks adjacent to railroads elsewhere in the state, where the oil was subsequently transported out of state. This Court in its opinion stated that it would not pause to consider whether the business of operating the pipeline was in interstate commerce, for the State had the power to impose the tax involved. The Mississippi Supreme Court in the case at bar in its opinion (Appendix A5, Jurisdictional Statement) quotes directly from the Supreme Court's opinion:

> "Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other

state can repeat the tax. For these reasons the commerce clause does not invalidate this tax. The judgment is affirmed. 337 U.S. at 668, 93 L.Ed. at 1620-21."

In the *Dunn Brothers* case, a gas transmission company constructing an interstate pipeline which crossed several states, including Mississippi, through an arrangement very similar to that employed by the appellant in the case at bar, shipped pipe by railroad to themselves as "consignee" at a railhead ramp in Mississippi. Dunn Brothers, holding a certificate of public convenience and necessity issued for interstate commerce, was engaged to deliver the pipe from the railhead ramps to the rights of way of the transmission company. The transmission company, like General Motors (R. 110 and 111), shipped the pipe as consignor by railroad to itself as consignee at railhead ramps in Mississippi. The Mississippi Supreme Court held that the tax levied upon the transportation activity was valid and concluded in part as follows: "So, the service by Dunn Brothers in carrying the pipe, after its acceptance by the Transmission Company, from depot or railhead in Mississippi to the right of way also in Mississippi, was an activity wholly within the State of Mississippi, was therefore intrastate, and the gross income therefrom was subject to the tax of two percent."

The *Dunn Brothers* case was subsequently appealed to the United States Supreme Court, wherein the appeal was dismissed for want of a substantial federal question.

Based upon the authority cited in its opinion (Appendix A, Jurisdictional Statement), the Mississippi Supreme Court has held that the transportation activity at issue was intrastate in nature and thus subject to the tax in question.

POINT 2

Even If the Transportation Activity in Question Is Construed to Be Interstate Commerce, the Tax Assessment Should Be Affirmed in That It Did Not Contravene the Interstate Commerce Clause of the United States Constitution Since the Tax Did Not Place an Undue Burden on Interstate Commerce.

As stated in the Mississippi Supreme Court's opinion (appearing at Appendix A3, Jurisdictional Statement): "The general rule is that a state may tax a local activity affecting or related to interstate commerce if the local activity is sufficiently separate from the out-of-state aspects of interstate commerce. *Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80, 90 L.Ed. 1832, 68 S.Ct. 1475 (1948)."

It is further stated at 15 C.J.S. *Commerce* §102(2):

"It is not the purpose of the commerce clause to relieve those engaged in interstate or foreign commerce from their just share of the state tax burden even though it increases the cost of doing business, and a tax which does no more than impose on those engaged in interstate commerce or their property a reasonable share of the burdens of government will not be condemned. The prohibited burden on interstate or foreign commerce is created by state interference with that commerce which is a matter distinct from the expense of doing business. Even interstate business must pay its way by bearing its share of local tax burdens. Interstate commerce is not immunized from carrying its fair share of the costs of the state government in return for the benefits it derives from within the state."

The Mississippi Supreme Court in the present case cited the case of *Rhoden* v. *Goodling Enterprises, Inc.*, 295 So.2d 433 (Miss. 1974), wherein the Court upheld a tax upon the gross income of a cable television system where a percentage of the signals rebroadcast by the taxpayer were received from outside the state. The Court in reaching its decision in *Goodling*, quotes from the Opinion of the United States Supreme Court in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U.S. 662, 69 S.Ct. 1264, 93 L.Ed. 1613 (1949):

> "Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate the tax."

In the *Dunn Brothers* case, *supra*, the Court in affirming a tax upon a transportation activity very similar to that found in the present case stated:

> " 'It is only for the carriage within Mississippi that the tax is demanded. A local drayman or an intrastate carrier would have been obliged to pay the tax here demanded. If, under the circumstances of this case, appellee should prevail, then by reason of its claim of interstate commerce, it would escape the burdens which fall on its competitors in intrastate commerce. Evidently equality for, not favoritism to, interstate commerce was the underlying purpose of Article 1, Section VIII, cl. 3, of the U. S. Constitution.' "

It is settled law that a state may lawfully impose upon a foreign corporation a tax for the privilege of doing business within its borders which is measured by the proportionate part of its gross receipts which are received within the state, *Maine* v. *Grand Trunk R. Co.*, 142 U.S. 217, 35 L.Ed. 994 (1891).

Apportionment presents no problem in this case for all of the transportation performed by appellant was within the taxing state of Mississippi. There can be no contention that rate of tax is unfair or that the tax within itself is discriminatory.

The mere fact that the appellant holds a certificate of convenience and necessity from the Interstate Commerce Commission is insufficient within itself to grant tax exemption. *Stone* v. *Interstate Natural Gas Co.*, (CCA-5) 103 F.2d 544, aff'd 308 U.S. 522, 84 L.Ed. 442 (1939):

> ". . . It is clear also that because a matter is regulable only by one government it is not thereby exempted from taxation by the other."

The appellant cites the case of *Spector Motor Service, Inc.* v. *O'Conner*, 340 U.S. 602 (1951), as authority on which it contends the taxes in the present suit were in violation of the commerce clause of the United States Constitution. The *Spector* case does not involve the same facts as the case at bar. In *Spector*, the petitioner, by motor carrier, transported goods through several different states without any break in the shipment of the goods prior to the time they were delivered to their ultimate destination. The United States Supreme Court held that the imposition of a franchise tax by the State of Connecticut based on the property owned by the petitioner contravened the interstate commerce clause of he United States

Constitution. However, the Court reaffirmed the rule announced in cases such as *Interstate Oil Pipe Line Company* v. *Stone, supra*:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. Interstate Oil Pipe Line Co. v. Stone, supra; International Harvester Co. v. Evatt, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390; Atlantic Lumber Co. v. Com'r of Corporations and Taxation, 298 U.S. 553, 56 S.Ct. 887, 80 L.Ed. 1328. The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633, or the publication of a newspaper, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823. See also, Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832."

In the concluding paragraph of the Mississippi Supreme Court's Opinion (appearing at Appendix A7, Jurisdictional Statement), the Court stated as follows:

> "It will be noted that Taxpayer has a large operation in this State. It is dependent upon the State for police protection and other State services the same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no

> danger of interstate commerce being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating the tax involved in this case."

WHEREFORE, PREMISES CONSIDERED, appellee prays that the appeal in this case be dismissed or that the judgment of the Supreme Court of the State of Mississippi be affirmed.

Respectfully submitted,

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III.

CERTIFICATE OF SERVICE

I, James H. Haddock, one of the counsel for appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of August, 1976, I served copies of the foregoing Motion to Dismiss or Affirm on all parties required to be served, by depositing copies of said Motion to Dismiss or Affirm in the United States Post Office, properly addressed, with first class postage prepaid, to Mr. Robert C. Cannada, Butler, Snow, O'Mara, Stevens and Cannada, at Post Office Box 22567, Jackson, Mississippi 39205, counsel of record for the appellant.

JAMES H. HADDOCK